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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 571

GRAHAM HARLEY,

Petitioner,

vs.

HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court
for the Eastern District of Wisconsin,

Respondent.

BRIEF AMICUS CURIAE OF THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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NOTICE

Please take Notice that upon the attached affidavit and upon all the pleadings, proceedings and papers heretofore had, the Louisville and Nashville Railroad Company, by its counsel, will move the Supreme Court of the United States, at its regular term thereof, to be held at the Capitol in the City of Washington, District of Columbia, commencing on the first Monday in October 1962 at the opening of Court on that day or as soon thereafter as counsel can be heard, for leave to file a brief amicus curiae in accordance with the attached motion.

Dated at Milwaukee, Wisconsin, this 7th day of December, 1962.

WICKHAM, BORGELT,
SKOGSTAD & POWELL

By: John R. Hoaglund, Jr.

TO: Sidney M. Eisenberg
Herbert R. Manger
1431 West State Street
Milwaukee 3, Wisconsin
Attorneys for Petitioner.

IN THE

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GRAHAM HARLEY

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vs.

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Respondent.

MOTION

Now comes the Louisville and Nashville Railroad Company, by its attorneys, Wickham, Borgelt, Skogstad & Powell, by Gerald J. Kahn of counsel, and upon the following affidavit and upon the pleadings and proceedings heretofore had, moves that the Court grant the Louisville and Nashville Railroad Company leave to file a brief amicus curiae in the above entitled matter.

WICKHAM, BORGELT,
SKOGSTAD & POWELL
Attorneys for Louisville and
Nashville Railroad Company

Gerald J. Kahn
710 North Plankinton Avenue
Milwaukee 3, Wisconsin
Of Counsel

IN THE

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GRAHAM HARLEY,

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vs.

HONORABLE ROBERT E. TEHAN,
Judge of the United States District Court
for the Eastern District of Wisconsin,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION

STATE OF WISCONSIN)
MILWAUKEE COUNTY) ss

John R. Hoaglund, Jr., being first duly sworn on oath deposes and says:

1. That he is one of the attorneys for the Louisville and Nashville Railroad Company, the defendant in an action brought by the petitioner, Graham Harley, as plaintiff, in the United States District Court for the Eastern District of Wisconsin; that said action, No. 61-C-147 was, by order of the respondent, the Honorable Robert E. Tehan, District Judge, transferred to the United States District Court for the Northern District of Georgia, following a hearing on the Louisville and Nashville Railroad Company's motion for such transfer.

2. That affiant is informed and believes that the respondent herein does not intend to file a brief, or have a brief filed on his behalf by the Office of the Solicitor General of the United States, in opposition to the Petition for Writ of Certiorari; that said respondent has given his consent to the Louisville and Nashville Railroad Company to file a brief amicus curiae with the Court in opposition to said Petition for Writ of Certiorari.

3. That the attorneys for the petitioner have withheld their consent to the filing of said brief amicus curiae by the Louisville and Nashville Railroad Company.

4. That the interest of the Louisville and Nashville Railroad Company will be directly affected by the Court's decision in this matter; that further, the interest of justice will best be served by the presentation of authorities and arguments favoring the respondent's position on the question presented for review.

Dated at Milwaukee, Wisconsin, this 7th day of December, 1962.

John R. Hoaglund, Jr.

Subscribed and sworn to before me
this 7th day of December, 1962.

Eleanor L. Schultz [SEAL]
Notary Public, State of Wisconsin

My Commission Expires: September 27, 1964

QUESTION PRESENTED FOR REVIEW

Was the order of July 25, 1960, entered by the District Court of the United States for the Eastern District of Wisconsin, granting a change of venue from the Eastern District of Wisconsin to the Northern District of Georgia, which order the United States Court of Appeals for the Seventh Circuit refused to vacate and set aside by its order of August 12, 1962, denying petitioner's petition for Writ of Mandamus, an abuse of judicial discretion?

STATEMENT OF THE CASE

The Louisville and Nashville Railroad Company accepts the statement of the case as presented by the petitioner, with the exception of the following:

1. The Louisville and Nashville Railroad Company filed its notice of petition for the transfer before the filing of its answer.

2. An affidavit was filed by the attorneys for the Louisville and Nashville Railroad Company in support of the motion for transfer, a fact which is not noted in the petitioner's statement of the case.

ARGUMENT

Rule 19 of the Revised Rules of the United States Supreme Court provides:

> 1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

Subsection (b) of the above paragraph outlines some of the relevant reasons for which the Court will grant a review on certiorari, among which are the following:

(1) Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals or of the United States Supreme Court;

(2) Where a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision.

Petitioner concedes that this action "might have been brought" in the United States District Court for the

Northern District of Georgia. 28 U.S.C. §1404(a) provides that the district judge may, in his discretion, transfer any civil action to another district where it might have been brought: *General Casualty Company v. Grubb*, 253 F. 2d 51 (7th Cir., 1958), *cert. denied*, 357 U.S. 907, 78 Sup. Ct. 1152, L. Ed. 2d 1157 (1958); *General Portland Cement Company v. Perry*, 204 F. 2d 316 (7th Cir., 1953).

Petitioner's argument is based almost entirely upon the decision in *Ford Motor Company v. Ryan*, 182 F. 2d 329, 330, (2d Cir., 1950), *cert. denied*, 340 U.S. 851; in which the Court of Appeals placed upon the defendant the burden of making a strong case for a transfer, noting that the plaintiff's privilege conferred by statute, of choosing a forum, is one factor to be considered against the "convenience of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'".

The Louisville and Nashville Railroad Company submits that Judge Tehan's opinion reflects that the Louisville and Nashville Railroad Company met the burden of proof incumbent upon it, and that the burden has now been placed upon the petitioner herein to establish that the respondent's order was clearly an abuse of discretion. *Higgins v. Carr Bros. Company*, 317 U.S. 572, 63 Sup. Ct. 337, 87 L. Ed. 468 (1943).

As was stated by Judge Simons in *Nicol v. Koscinski*, 188 F. 2d 537 (6th Cir. 1951) at Page 538:

> Determination as to the greater convenience or inconvenience must rest within the sound judicial discretion of the district judge to whom the petition for change of venue is addressed, and his decision should not be set aside unless there is apparent an abuse of discretion. This is so whether we accept

> the view of Judge Frank in Ford Motor Company v. Ryan, 2 Cir., 182 F. 2d 329, 331, that the judge must guess and that we should accept his guess unless it is "too wild", or whether we take the more conventional approach to the problem by Judge Learned Hand in the same case, who felt that to set aside an order the balance of convenience must be strong enough to declare a finding of the district judge "clearly erroneous".

And the Court of Appeals for the Seventh Circuit in *General Casualty Company v. Grubb, supra,* noted that an appellate court in reviewing a District Judge's exercise of discretion in balancing the conveniences must be careful to avoid substituting its discretion for the District Judge's.

The question here presented to the Court is not novel, the Court having previously considered the problem in *Norwood v. Kirkpatrick*, 349 U.S. 29, 75 Sup. Ct. 544, 99 L. Ed. 789 (1955). In that case, the Court reviewed the common law doctrine of *forum non conveniens* and the effect of Section 1404(a) upon that doctrine. The majority opinion noted that the old doctrine of *forum non conveniens* involved the possibility of dismissal of a case because of the inappropriateness and inconvenience of the forum chosen by the plaintiff, whereas Section 1404(a) now provides merely for transfer rather than dismissal, thus alleviating the harsh results of a finding of inconvenience after the running of a statute of limitations. The Court in the *Norwood Case,* in holding that the judgment of the District Court was correct in ordering the requested transfer, said (at Page 32):

> When Congress adopted Sec. 1404(a), it intended to do more than just codify the existing law on forum non conveniens. As this Court said in Ex Parte Collett, 337 U.S. 55-61, Congress, in writing Sec.

> 1404(a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in Sec. 1404(a) for transfer. When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification. As a consequence, we believe that Congress, by the term "for the convenience of parties and witnesses, in the interest of justice," intended to permit courts to grant transfers upon *a lesser showing of inconvenience*. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that *the discretion to be exercised is broader*. [Italics added]

As was pointed out in *United States v. American Linen Supply Co.*, 134 F. Supp. 21 (E.D. Wis. 1955), Section 1404(a) sets out three tests to be applied in deciding the motion for transfer of a cause, the first being the convenience of the parties; the second being the convenience of witnesses; and the third being the interests of justice. The third test embodies consideration of:

> The relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 Sup. Ct. 839, 843 91 L. Ed. 1055. *Nicol v. Koscinski, supra. Heller & Company v. Perry*, 201 F. 2d 525 (7th Cir. 1953).

A review of the respondent Judge's opinion illustrates that all of the above mentioned factors were taken into account in arriving at his decision. The Judge concluded the obvious, that the trial would be far more convenient

and less expensive to the defendant railroad company if it were tried in Georgia rather than in Wisconsin. The opinion noted that the defendant's witnesses, being nine in number, reside in Georgia, Tennessee and Kentucky, whereas the only specified person who is a Wisconsin resident and who would testify on behalf of the plaintiff, is the plaintiff himself. There was no showing by the plaintiff that a transfer of the case would necessarily result in the plaintiff's being unable to continue in the prosecution of the law suit because of financial or physical hardship, factors which were considered in *General Portland Cement Company v. Perry, supra;* and *Grubbs v. Consolidated Freight Ways, Inc.*, 189 F. Supp. 404 (D.C. Mont. 1960). Respondent's opinion also pointed out that the calendar in the Georgia district was less crowded than in Wisconsin, a relevant factor taken into account in several of the cited decisions.

The Louisville and Nashville Railroad Company further submits that the five cases cited in support of petitioner's contentions do not clearly illustrate an abuse of discretion in this instance. The cases are distinguishable on their facts, one involving a petition for transfer to a district court only "several minutes distant" from the court selected by the plaintiff, *Jenkins v. Wilson Freight Forwarding Company*, 104 F. Supp. 422 (D.C. N.Y. 1952); and another being a request for a transfer to a court where neither of the parties lived, two of the key witnesses residing in the district in which plaintiff brought his suit. *Grubbs v. Consolidated Freight Ways, Inc., supra.* The remaining cases merely illustrate that the lower court did not abuse its discretion in refusing to grant a transfer.

Cases which illustrate proper use of discretion in allowing transfers and which would support Judge Tehan's decision are:

Nicol v. Koscinski, supra.

Heller & Company v. Perry, supra.

Petitioner's brief attacks the affidavit submitted by the Louisville and Nashville Railroad Company as being hearsay and therefore of no probative value. It is sufficient, however, to point out that affidavits of counsel were the basis of the decisions in cases cited by the petitioner and were indeed called for by the courts in those decisions. The affidavit in support of the Louisville and Nashville Railroad Company's motion conformed in all respects to those in the cases cited.

CONCLUSION

On the basis of the foregoing authorities the Louisville and Nashville Railroad Company submits that the petitioner has failed to show special and important reasons for the granting of a writ of certiorari. Petitioner has failed to show that Judge Tehan's order of August 10, 1962, was "clearly erroneous", that it was in direct conflict with decisions of other Courts of Appeals or of the United States Supreme Court, or that the order constituted a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of the Supreme Court's power of supervision. The respondent clearly considered the established tests in granting the order for change of venue, and his decision was a proper exercise of the broad discretion granted him by Section 1404(a) and the decision in *Norwood v. Kirkpatrick,*

supra. The Louisville and Nashville Railroad Company therefore respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Attorneys for Louisville and
Nashville Railroad Company

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Of Counsel

CERTIFICATE

As one of the attorneys for the Louisville and Nashville Railroad Company, I do hereby certify that a printed copy of the foregoing brief amicus curiae has been served upon the Honorable Robert E. Tehan, Judge of the United States District Court for the Eastern District of Wisconsin, on Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, on Sidney M. Eisenberg and Herbert R. Manger, attorneys for the petitioner, Graham Harley, and on the Solicitor General, Department of Justice, Washington 25, D. C. by placing copies of same in the United States mail, directed to them at their respective offices, postage prepaid.

Dated, Milwaukee, Wisconsin, this 10th day of December, 1962.

WICKHAM, BORGELT,
SKOGSTAD & POWELL

BY: John R. Hoaglund, Jr.
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Nashville Railroad Company

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